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Supreme Court, U.S.
FILED

No. 04-796

DEC 9 - 2004

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROQUE R. MORALES, pro se,

Petitioner,

v.

KEYSTONE DEVELOPMENT CO. LLC,
a Colorado Limited Liability Company, NAHP, LLC,
a Colorado Limited Liability Company and
Greg McIlvain, an individual,

Respondents.

On Petition For Writ Of Certiorari
To The Colorado Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

ROQUE R. MORALES, pro se
1003 Madison
Denver, CO 80206
Ph: 303-322-1751, 970-887-0277

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals of the State of Colorado was in serious error of law by affirming the judgment of the District Court that granted summary judgment based on issues that were off point and irrelevant to the case. By unjustly granting summary judgment the petitioner was denied his right to a court hearing of his case and his rights of due process as provided by the Constitution of the United States in Amendments V and XIV, Section 1.

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PRIOR OPINIONS

The opinions whose review is sought are published and are reproduced in Appendices A, B, C and D. The Court of Appeals, State of Colorado, opinion is reproduced in Appendix A. The Court of Appeals, judgment affirmed, and the District Court, order granting summary judgment, are the only statements made by the court system. A court hearing was not allowed.

JURISDICTION

Petitioner seeks this Court's review of the judgment entered on April 8, 2004 by the Court of Appeals, State of Colorado, by a Petition For Writ Of Certiorari pursuant to the jurisdiction conferred by rules of the Supreme Court part III Rule 10. This petition is timely filed within ninety days of September 17, 2004, the date of court order denying discretionary review by the Supreme Court, State of Colorado in accordance with Rule 13.1 and Rule 13.3 of this Court.

CONSTITUTIONAL PROVISIONS

Amendment V, United States Constitution in pertinent part provides:

> No person shall be deprived of life, liberty, or property, without due process of law,

Amendment XIV, Section 1, United States Constitution in pertinent part provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

The intent of the parties, the conditions of the transaction and the legal requirements of this transaction are clearly stated in the Contract to Buy and Sell Real Estate dated April 23, 1997. The contents of this legal document cannot been questioned. The contents of this document have not been contested by the respondents. Thus, this evidence is deemed to be true and is an accepted fact.

The issue presented to the Court is whether the District Court, Grand County has denied the petitioner the rights of due process of the law and the protection of the petitioner's property as provided by statute law, governing case law and statutory authority.

Court case files in the District Court of Grand County and the victims of the judicial system in Grand County will show numerous property and boundary location cases decided in the same unjust manner as this case, with the cases decided in favor of the developers. The situation can be considered as a land grab, sanctioned by public officials using their professional status to deprive citizens of their property. The situation calls for an exercise of the Court's supervisory powers.

The case arises from the sale of a parcel of real property to the respondents that excluded a portion of the parcel to be retained by the seller. The sales contract was prepared and presented by the respondents Greg McIlvain and the partnership of Keystone Development Co., LLC, a Colorado Limited Liability Company (Appendix E). The addendum to the sales contract signed and dated March 19, 1997, under paragraph 3, describes the north and west boundaries of the "out parcel" to be retained by the seller. The sales contract describes the west boundary of the out parcel as "about where west fence line is west of buildings" (Appendix F).

The sales transaction closed on February 18, 1998 with no changes made to the original sales contract. In the spring of 1998 the respondents started construction of a road that was considerably to the east of the agreed-to west boundary of the out parcel as defined by the sales contract (Appendix G).

The petitioner attempted to work with public officials and representatives of Keystone Development to resolve the obvious noncompliance with the sales contract. Contacts were made with Mr. Greg McIlvain and Mr. Chris Hovey of Keystone Development, but they did not respond to the problem. Unable to resolve the problem a complaint against the respondents was filed in the District Court, Grand County, State of Colorado.

The case presents a clear cut situation of a legal real estate contract describing the boundaries of the property to be sold. C.R.S. 38-44-101 and the generally accepted standards of practice in boundary location law clearly identify the west boundary as the fence.

The respondents did not present any legal evidence to justify the boundary they claimed and only presented a Motion & Memorandum Brief For Summary Judgment based on doctrines that are off point and of no relevancy to the situation. This motion for summary judgment was granted by the District Court denying the petitioner his rights to a court hearing, to present his case, to present an expert witness and denying the petitioner of his constitutional rights of the due process of law.

The Court of Appeals, State of Colorado affirmed the judgment of the District Court with a statement repeating the District Court's statement in the Order Granting Motion For Summary Judgment.

The Colorado Supreme Court denied the Petition For Certiorari, en banc.

FACTS

The facts surrounding this situation are:

1. The situation, in total, involves two factors, A.) an existing sales contract and B.) the legal obligation of the parties to comply as was agreed to by this contract. (Appendix E)

2. The sales contract as a legal document was created by the respondents themselves and was signed by the parties involved in the transaction. As a legal document, enforceable by law the parties are bound to comply with the contract as it is written. Contract law, real estate law and boundary law all state that the transfer of real property must be in writing. There is no documentation in court records or anywhere else of changes to

the original sales contract. The respondents also have not provided any evidence of changing the terms of the original contract.

3. The addendum in the Contract To Buy And Sell Real Estate, dated March 19, 1997 clearly identifies the west boundary of the out parcel as "about where west fence line is west of buildings."

4. The petitioner is the sole owner of the property. The property was acquired through the petitioner's mother's estate along with the rights and obligations of the existing sales contract. The petitioner's mother passed away and the probate court case ceased to exist one year and eight months before the closing of this transaction. The probate court did not exist at the time of the creation of the respondents' deed.

5. An existing contract can only be changed or extinguished in writing and must be agreed to and signed by the involved parties.

6. The issue in this case is simply interpreting a valid sales contract and locating this interpretation on the ground.

The District Court, Grand County, State of Colorado granted the Order Granting Motion For Summary Judgment, dated December 27, 2002. In agreement with the respondents' claims, the courts' conclusions are based on two "doctrines," the doctrine of res judicata and the doctrine of merger.

The transfer of real property is required to be in writing. The Contract to Buy and Sell Real Estate dated April 23, 1997 is the only previously agreed to and signed document.

The respondents' and the court's statements indicate that there was previous action and a determination was made by the probate court on the respondents' claim of the location of the west boundary. The conclusions are that this in itself is sufficient to change the terms of the existing sales contract.

The facts are that the probate court case did not exist on the date when the respondents' deed was created. The respondents have not provided any documentation or even court dates to substantiate these claims. In fact, there is nothing in "writing" to substantiate the claims. Transfer of real property must be in writing.

The Contract To Buy And Sell Real Estate was agreed to and signed on April 23, 1997. This document is the only mutually agreed to and signed writing describing the conditions of the transaction, the item for sale and the price involved. This document is the only document stating the requirements to be complied to by the parties in fulfilling the requirements of the transaction.

The sales contract was created and offered by the respondents. Rules are recognized in dealing with construction of instruments as to parties. An instrument of conveyance is constructed against the scrivener, whether he is the grantor or the grantee. It is strongly construed against the person who prepared the instrument since he selected the words to be used and should be bound by them. This is based on the presumption that the author took every possible precaution to protect himself and that

the other party should not be bound by hidden meanings the scrivener intended to place in the language to his own advantage.

The only previously agreed to and signed writing is the original sales contract and the rule of monuments clearly identify the fence/monument as the west boundary of the out parcel.

The petitioner has presented the lower courts with evidence on the many legal aspects defining the west boundary as the fence, including the generally accepted standards of practice in locating the boundary on the ground as it is governed by the directives of the instrument of conveyance. This type of a transaction is, "a conveyance of interest in land by dedication." A transaction where there is an existing property with an existing deed/legal description is, "a conveyance of interest inland by deed." C.R.S. 38-44-101.

There is an overwhelming volume of evidence that establishes the west boundary as the "fence." The correct legal term for the fence is a "monument." The laws or rules governing this situation are covered equally in documents governing state and federal law. The United States Bureau of Land Management (BLM and USGS) publishes *The Manual of Surveying Instruction* (www.resurvey.org/blm.htm). State law is expressed in the Colorado Revised Statutes, Article 38, and the same evidence is expressed in all the writings of learned scholars that define in detail the Generally Accepted Standards of Practice. All of these identify the fence as the monument and the location of the west boundary.

The primary rule that is included in Federal Law (USGS and BLM), State Law (CRS 38-44-101) and the generally accepted standards of practice is the "Rule of Monuments" that states:

> In weighing the calls of the instrument of conveyance for the purpose of ascertaining the intention, certainty and definiteness give natural monuments precedence over all other calls; that artificial monuments rank second, adjoiners third, course and distance fourth, and quantity last.

Where there is a call for a monument, bearing and distance are elements to be used to pinpoint the area of investigation to recover monuments called for.

The Colorado Revised Statutes, CRS 38-44-101 states:

II PRIORITY OF EVIDENCE IN BOUNDARY DISPUTES

Monuments control course and distances. In a conveyance of interest in land, whether by ordinary deed or by dedication, if the description of the land is fixed by ascertainable monuments and by course and distance, the well-settled general rule is that the monuments will control the course and distances if they are inconsistent with the monument calls. *Wallace v. Hirsch,* 142 Colo. 264, 350 P.2d 560 (1960).

Course and distances least reliable of calls. A general rule of construction invoked in the case of repugnant calls in a deed is that courses and distances are the least reliable of all calls, and that a call which designates a point capable of precise and exact location takes precedence over a call for a course and distance if there is a

repugnancy between the two. *Wallace v. Hirsh*, 142 Colo. 264, 350 P.2d 560 (1969).

The normal or ordinary situation is a conveyance of interest in land by ordinary deed, where there is an existing parcel with an existing deed. The situation in this case is a conveyance of interest in land by dedication, where the parcel of land is described by the instrument of conveyance, and a deed and a legal description is created from this information.

The doctrine of res judicata simply does not apply. The time line of events simply makes prior action as the petitioners claim impossible.

The doctrine of res judicata requires prior actions on the approval of the respondents' deed. The respondent and the District Court in the Order Granting Summary Judgment, claim this action was in the Boulder County Probate Court case. The facts are that the petitioner's mother died on November 27, 1997 and the probate case ceased to exist. The closing on the sales transaction and the creation of the respondents' deed occurred on February 18, 1998. The protected person had passed away, the probate case did not exist and could not act as the respondents claim. The respondents have not produced any documents or court dates to prove their claims of prior action.

The doctrine of merger is off point, has no relevancy and simply does not apply to this case.

In error, the respondents claim and the District Court agrees that the doctrine of merger can change and extinguish a valid sales contract.

A statement of the doctrine of merger:

> Under "Doctrine Of Merger," provisions of contract for sale of real estate merge at closing into deed, and rights of parties are determined by covenants in deed, rather than by language in contract. *Feit v. Donahue,* 826 P.2d 407 at 412 (Colo. App. 1992). (Appendix H, page 407, sect. 4, par. 1).

The respondents and the District Court in the Order Granting Motion For Summary Judgment present the following citations as proof that the doctrine of merger can change or extinguish the sales contract,

> *Feit v. Donahue,* 826 P.2d 407 at 412 (Colo. App. 1992). (Appendix H)
>
> *Lookout Mountain Paradise Hills Homeowners Association v. View Point Associates*, 867 P.2d 70 (Colo. App. 1993). (Appendix I)

There is little doubt that the respondents' attorney has ever read these citations. It is even more incredible that a practicing attorney would present such evidence or that a court would accept this evidence. The statement of the doctrine of merger and the citations show that the subject matter is "provisions of contract" (covenants, easements, rights of way, etc.) and the "rights of the parties" relative to the provisions.

The purpose of the doctrine of merger is to determine the rights of the parties involving these provisions (covenants, easements, rights of way, etc.) depending on the dominant factors that are appurtenant to the land or that are agreed to in relevant documents signed by the parties. The final determination of the rights of the parties are determined by the dominant provisions that for example,

run with the land and must be included in the deed. This dominant provision must be included or merged into the deed and overrides the contract that may state otherwise.

The doctrine of merger, is concerned with "provisions of the contract" and cannot change or extinguish the contract.

Throughout this case the respondents have never presented any evidence proving the legality of the boundary they claim. The respondents have never disputed either the petitioners evidence or that the sales contract identifies the fence as the west boundary of the out parcel. Thus, the petitioner's evidence and the fence identifying the west boundary of the out parcel are deemed to be true and accepted facts.

The only issues raised by the respondents are that the petitioner's actions on this matter are barred by the two doctrines. The two doctrines can be proven to be impossible, off point and irrelevant to this case. The respondents simply do not have a case.

REASONS FOR GRANTING THE PETITION

The Constitution of the United States provide that no person shall be deprived of property without due process of law, that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens and no state shall deny any person the equal protection of laws.

The District Court, Grand County, State of Colorado granted summary judgment without allowing the petitioner his rights to present his case, **depriving the**

petitioner of his property without due process of law. The District Court did not recognize statute law, governing case law and statute authority that clearly proved the petitioner's case. The petitioner was **denied the protection of this law.** The basis for the summary judgment was identified by the District Court as "Colorado law." **This law was created by the District Court from a doctrine.**

Amendment V, United States Constitution in pertinent part provides:

> No person shall be deprived of life, liberty or property without due process of law.

Amendment XIV, Section 1, United States Constitution in pertinent part provides:

> No state shall make or enforce any law which shall abridge the privileges or Immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of laws.

The petitioner believes that the situation in this case can be simply stated as:

1.) There exists a valid sales contract that creates a conveyance of interest in land by dedication or by the description in this sales contract. This contract can not be altered or extinguished without the agreement of the parties in writing.

2.) There is governing case and statutory authority that clearly identifies the boundary in question as the fence.

The respondents have never disputed the legal evidence presented by the petitioner that the sales contract describes the west boundary of the out parcel as the fence. Thus, this evidence is deemed to be true and is an accepted fact.

The only issues raised by the respondents are that any action by the petitioner is barred by two "doctrines":

1.) The doctrine of res judicata – the application of which is impossible since the factual dates of events make actions by the probate court, as claimed by the respondents, impossible since the probate court did not exist to take action as the respondents claim.

2.) The doctrine of merger – this is a "doctrine," which addresses the rights of parties concerning covenants, easements, etc. The doctrine is off point and has no relevancy to this case.

A judge hearing a case is required to have the knowledge to make a judgment on a case. It can easily be said that the common person knows that a valid contract cannot be changed or extinguished without the agreement of the parties, in writing.

The District Court immediately granted the respondents' motion for summary judgment based solely on these two erroneous doctrines. The petitioner was immediately denied his rights of due process and deprived of his property without the due process of law.

1.) the petitioner was denied his right to a hearing

2.) the petitioner was denied his right to present his case

3.) the petitioner was denied his right to present expert witness. C.R.Civ.P. 56 states that summary judgment is not allowed when it would cause denying hearing of expert witness.

The District Court far departed from the accepted and usual course of judicial proceedings. The Court of Appeals, State of Colorado, affirmed the District Court's judgment, reciting the same erroneous doctrines and sanctioned the same departure from the accepted and usual course of judicial proceeding.

It is the petitioner's observation that in the jurisdiction of the District Court, Grand County, the petitioner's situation is not an isolated case. It is also the observation of the petitioner that the victims do not know the law and simply have to accept the situation or as in the petitioner's case, have run out of money and cannot afford an attorney. The situation calls for an exercise of the Court's supervisory power.

The District Court's actions go far beyond making a serious error of law or a misinterpretation of the law. The District Court has simply omitted or ignored all statute law, governing case law and statutory authority.

The District Court has abused it's authority in "creating" its own law, as for example asserting that, "The court notes that under Colorado Law the provisions of the sales contract. . . ." (see Order Granting Motion For Summary Judgment, page 2, part II). A doctrine is not statute law and is only based on broad general principles and gains or looses its power from specifics or existing statutes.

There was no verdict in this case. The District Court's granting summary judgment did not allow the due process of law, presentation of the petitioner's case and a verdict was not made or decided based on the weight of the evidence.

There is an overwhelming volume of evidence that would prove the legality of the petitioner's position. The presentation of the expert witness, denied by the courts, would add a great emphasis to this evidence.

The United States Bureau of Land Management (BLM) publishes *The Manual of Surveying Instruction,* a federal document containing rules and procedures governing surveying, boundary location law and the subject matter involved in this case. It is emphasized that this is a federal manual.

The petitioner has observed numerous boundary disputes, in Grand County, a booming resort area involving many land transactions. These boundary disputes are being decided by the courts in the same manner as this case has been decided. Many victims of the system do not even realize they are victims. Without knowledge of the applicable law, the average citizen is forced to simply accept the word of the developer, the public official or the judge deciding the case. The result is that the average citizen is deprived of his property without the due process of law.

The petitioner also has observed, as this case demonstrates, judges, attorneys, public officials as the county surveyor and professionals as developers do not have knowledge, ignore, omit or simply do not accept this federal law as it is set down by text as those published by

the Bureau of Land Management. These texts do recognize these generally accepted standards of practice as law.

The petitioner Prays that the Honorable Supreme Court will consider the facts in this case, the erroneous law created by the courts and the unjust ruling that resulted. There is a grave need for the recognition and compliance with this law to provide an equitable and equal protection for all. This is a very important question of federal law that apparently has not been established and should be settled by the Supreme Court.

CONCLUSION

The respondents are making claims, without legal authority and in open and direct contradiction to statute law. The respondents claim is made in wanton and willful disregard of the rights of the petitioner and that such claims made by the respondents are frivolous and groundless.

The intent of the boundary as defined by the Sales Contract To Buy And Sell Real Estate was to preserve the old homestead. The petitioner seeks judgment of this court quieting title of the property as defined by the sales contract, returned to the petitioner in its original condition.

In addition, petitioner seeks an award of special, general and punitive damages against the respondents together with such other and further relief to which

petitioner is entitled under Colorado Law and the circumstances of this matter.

Respectfully submitted,

ROQUE R. MORALES, pro se
1003 Madison
Denver, CO 80206
Ph: 303-322-1751, 970-887-0277

APPENDIX A

COLORADO COURT OF APPEALS

Court of Appeals No. 03CA0293
Grand County District Court No. 02CV66
Honorable Richard P. Doucette, Judge

Roque R. Morales,

Plaintiff-Appellant,

v.

Keystone Development Company, L.L.C., a Colorado limited liability company; and Greg McIlvain, an individual,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division A
Opinion by JUDGE STERNBERG*
Davidson, C.J., and Ney*, J., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
April 8, 2004

Roque R. Morales, Pro Se

Stern & Newton, P.C., Richard E. Newton, Granby, Colorado for Defendants-Appellees

Plaintiff, Roque R. Morales, appeals the summary judgment in favor of defendant, Keystone Development Company, LLC, and Greg McIlvain. We affirm.

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* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2003.

This action arises from the conveyance of approximately twenty-seven acres of land from plaintiff's mother's estate by personal representative deed, dated February 13, 1998, to defendants. The deed contains a metes and bounds description of the property conveyed and excludes certain property that was subsequently conveyed to plaintiff by personal representative deed, dated July 6, 1999.

Plaintiff alleged in the complaint that defendants have encroached on the property excluded from the February 13, 1998, deed. Plaintiff asserted that based on the real estate sales contract entered into by defendants, the west boundary of the excluded property was to be based on an existing fence located adjacent to his mother's residence. Plaintiff asserted claims for breach of the real estate sales contract, trespass, and adverse taking of his property by defendants.

Defendants moved for summary judgment, arguing that the deeds are clear and unambiguous and that the fence line relied upon by plaintiff does not establish the boundary between the two properties. Defendants argued that under the real estate sales contract the fence was to be an approximate boundary and that, in any event, plaintiff's claims were barred by the doctrines of collateral estoppel, res judicata, and merger by deed.

The trial court found that under Colorado law the provisions of the real estate sales contract were merged into the personal representative's deed upon closing and delivery of that deed. Accordingly, the court found that any disputes regarding the boundary line created by the contract were resolved by the delivery and acceptance of the deed.

The court also found that plaintiff's claims were barred by the doctrine of res judicata. The court determined that plaintiff, as one of the heirs of his mother's estate, had the opportunity to object to the contract and the deed signed by the personal representative and that this issue could have been heard by the probate court.

The court therefore granted defendants' motion for summary judgment and dismissed plaintiff's complaint with prejudice.

On appeal, plaintiff contends that the trial court erred in applying the doctrine of merger. We disagree.

Under the doctrine of merger, the provisions of the contract for the sale of real estate merge at closing into the deed. Thus, the rights of the parties are determined by the language in the deed rather than by the language of the contract. *See Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs*, 867 P.2d 70 (Colo. App. 1993); *Feit v. Donahue*, *supra*.

Also, because the claims set forth in plaintiff's complaint for trespass and adverse taking are dependent on his claim that the western boundary is the fence line, we conclude that the trial court properly granted summary judgment as to these claims. To the extent that plaintiff raises other arguments in his briefs to this court, we conclude that they are not properly before us for review. *See Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980) (issues raised for the first time on appeal are not properly before the appellate court).

The judgment is affirmed.

CHIEF JUDGE DAVIDSON and JUDGE NEY concur.

APPENDIX B

DISTRICT COURT, GRAND COUNTY, STATE OF COLORADO Court Address: 308 Byers Avenue, POB 192 Hot Sulphur Springs, CO 80451	
Plaintiff(s): ROQUE R. MORALES **Defendant(s):** KEYSTONE DEVELOPMENT COMPANY, LLC, a Colorado Limited Liability Company, NAHP, LLC a Colorado Limited Liability Company, and GREG MCIIVAIN [sic], and individual	Case No: 02CV66

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the Defendants' Motion for Summary Judgment filed November 14, 2002. Plaintiff, who is appearing without counsel, responded to the motion on November 27, 2002 and a reply was filed on December 4, 2002. Based upon its review of the pending motion, the response and reply, the court finds, determines, concludes and orders as follows:

I. FACTUAL BACKGROUND

This dispute arises out of the conveyance of approximately 27 acres of the Plaintiff's mother's estate by personal representative deed dated February 13, 1998 to the Defendants. The personal representative's deed is signed

by the Plaintiff's sister as personal representative of their mother's estate. It contains a metes and bounds description of the property to be conveyed and excludes certain property owned by the estate. (See Exhibit I to the Defendants' Motion for Summary Judgment.)

Plaintiff is the owner of that portion of his mother's property which was excluded from the personal representative's deed of February 18, 1998. (See Exhibit J to the Defendants' Motion for Summary Judgment.) He acquired the property from the personal representative of the estate by deed dated July 6, 1999.

Plaintiff asserts that the Defendants have encroached on the property reserved in the deed of February 18, 1998. According to Plaintiff the west boundary of the property to be reserved was to be determined based upon an existing fence located adjacent to his mother's residence. (See Exhibit K to the Motion for Summary Judgment.)

Defendants argue that the deeds, Exhibit I and J, are clear and unambiguous. The Defendants are the owners of the land described in their deed, Exhibit I, and the Plaintiff is the owner of the land described in Exhibit J. The fence line Plaintiff refers to is not the boundary between these properties.

Plaintiff bases his claim on the language contained in the sales contract, see Addendum, Exhibit C attached to Exhibit B to the Motion for Summary Judgment at paragraph 3. As described in the Addendum, the westerly boundary of the retained parcel was to be approximately the fence that existed, not the line described in the legal description in the personal representative's deed of February 18, 1998. Plaintiff asserts that since the fence was to be the boundary, construction by Defendants on the strip

of land between the fence and the legal description in the deed of February 18, 1998 is an encroachment and trespass on his property.

Defendant argues that the fence was to be the approximate boundary and in any event Plaintiff's claims are barred by merger and *res judicata*.

II. CONCLUSIONS

The Court notes that under Colorado law the provisions of a sales contract such as Exhibits B and C to the Motion for Summary Judgment are merged into the personal representative's deed, Exhibit I, upon closing and delivery of that deed. Any disputes regarding the language in the addendum to the contract are resolved by the delivery and acceptance of the deed. *Lookout Mountain Paradise Hills Homeowners Association v. View Point Associates*, 867 P.2d 70, 76 (Colo.App. 1993); *Feit v. Donahue*, 826 P.2d 407, at 412 (Colo.App. 1992). There are no claims available to the Plaintiff based upon any language contained in the contract.

In addition, Defendants assert Plaintiff's claims are barred by the doctrine of *res judicata*. The Court agrees with the defendant.

As one of the heirs of this mother's estate, Plaintiff had the opportunity to object to the contract and the deed signed by the personal representative. The probate court heard, or could have heard, any of Plaintiff's concerns over the legal description in the deed to the Defendant and in the deed to the Plaintiff.

Under the circumstances presented here, Plaintiff's claims are barred by the doctrine of *res judicata*. *City and*

County of Denver v. Block, 814 P.2d 824 (Colo. 1991); *Cruz v. Bennine*, 984 P.2d 1173 (Colo. 1999); and *Turkey Creek, Ltd. v. Anglo America*, 43 P.3d 701 (Colo.App. 2001).

III. ORDER

Having reached the above conclusions, the court will enter the following orders:

1. Defendants' Motion for Summary Judgment is granted and all of the Plaintiff's claims against the Defendants are dismissed with prejudice.

2. Plaintiff shall pay Defendants' costs, each party shall pay their own attorney's fees.

Dated this 27th day of December 2002, at Hot Sulphur Springs, Colorado.

BY THE COURT:

/s/ Richard P. Doucette
Richard P. Doucette, Judge

cc: Plaintiff
Def. att.

COLORADO COURT OF APPEALS August 03, 2004
No. 03CA293 MANDATE

ROQUE R. MORALES,
PLAINTIFF-APPELLANT
v.
KEYSTONE DEVELOPMENT COMPANY, LLC, A COLORADO LIMITED, LIABILITY COMPANY, GREG MCILVAIN, AN INDIVIDUAL,
DEFENDANT-APPELLEE

Appeal from the District Court of GRAND COUNTY
Honorable RICHARD P. DOUCETTE, Judge
No. 2002CV000066

This proceeding was presented to this court on the record on appeal. In accordance with its announced opinion, the Court of Appeals hereby ORDERS:

JUDGMENT AFFIRMED

Clerk of the Court of Appeals

By: /s/ Kim Graff
Deputy Court Clerk

APPENDIX C

SUPREME COURT, STATE OF COLORADO TWO EAST 14th AVENUE DENVER, COLORADO 80203 CERTIORARI TO THE COURT OF APPEALS, 03CA0293 DISTRICT COURT, GRAND COUNTY, 02CV66	CASE NO: 04SC302 [SEAL]
Petitioner: ROQUE R. MORALES v. **Respondent:** KEYSTONE DEVELOPMENT CO., LLC, a Colorado limited liability company; NAHP, LLC, a Colorado limited liability company; and GREG MCILVAIN, an individual	
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JULY 26, 2004. Copies mailed via the State's Mail Services Division on 7/26/04. *VAD*

Roque R. Morales
1003 Madison
Denver, CO 80206

Richard E. Newton
62510 Highway 40
PO Box 50
Granby, CO 80446

Honorable Michael S. O'Hara
Chief Judge
Routt County Courthouse
P.O. Box 773117
Steamboat Springs, CO 80477

Clerk of the Grand Combined Court
Grand County Courthouse
P.O. Box 192
Hot Sulphur Springs, CO 80451

Clerk of Court
Colorado Court of Appeals

APPENDIX D

SUPREME COURT, STATE OF COLORADO TWO EAST 14th AVENUE DENVER, COLORADO 80203 CERTIORARI TO THE COURT OF APPEALS, 03CA0293 DISTRICT COURT, GRAND COUNTY, 02CV66	CASE NO: 04SC302 [SEAL]
Petitioner: ROQUE R. MORALES, v. **Respondent:** KEYSTONE DEVELOPMENT CO., LLC, a Colorado limited liability company; NAHP, LLC, a Colorado limited liability company; and GREG MCILVAIN, an individual.	
ORDER OF COURT	

Upon consideration of the Petition for Rehearing in Supreme Court filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition for Rehearing in Supreme Court shall be, and the same hereby is, DENIED.

BY THE COURT, SEPTEMBER 16, 2004. Copies mailed via the State's Mail Services Division on 9-17-04. SLA

Roque R. Morales
1003 Madison
Denver, CO 80206

Richard E. Newton
62510 Highway 40
PO Box 50
Granby, CO 80446

APPENDIX E

The printed portions of this form have been approved by the Colorado Real Estate Commission. (CBS) 3-7-96)

THIS FORM HAS IMPORTANT LEGAL CONSEQUENCES AND THE PARTIES SHOULD CONSULT LEGAL AND TAX OR OTHER COUNSEL BEFORE SIGNING.

VACANT LAND/FARM AND RANCH CONTRACT TO BUY AND SELL REAL ESTATE

March 19, 1997

I, PARTIES AND PROPERTY: Greg McIlvain (deed will go into a partnership name), buyer(s) (Buyer), (~~as joint tenants/tenants in common~~) agrees to buy, and the undersigned seller(s) [Seller], agrees to sell, on the terms and conditions set forth in this contract, the following described real estate in the County of Grand, Colorado, to wit:

Parcel A and Parcel B Morales Parcels Subdivision located in SW ¼ Sec. 32, Township 2 North, Range 76 West of 6th P.M. Also known as Lots 2, 3 and 4 Brau Tracts Less approx. 2.40 acres known as Morales buildings where home and all outbuildings are not included in sale. Sellers are selling 27 acres more or less of vacant land. Exact legal description to be attached, when available, as Exhibit B.

known as No. East Garnet Ave., Granby, CO. 80446
Street Address City State Zip

together with all interest of Seller in vacated streets and alleys adjacent thereto, ~~all~~ easements and other appurtenances thereto, all improvements thereon and all attached

fixtures thereon, except as herein excluded (collectively the Property).

2. INCLUSIONS/EXCLUSIONS. The purchase price includes the following items (a) if attached to the Property on the date of his contract: lighting, heating, plumbing, ventilating, and air conditioning fixtures, TV antennas, water softeners, smoke/fire/burglar alarms, security devices, inside telephone wiring and connecting blocks/jacks, plants, mirrors, floor coverings, intercom systems, built-in kitchen appliances, sprinkler systems and controls, built-in vacuum systems (including accessories), and garage door openers including ___ remote controls; (b) if on the Property whether attached or not on the date of this contract; storm windows, storm doors, window and porch shades, awnings, blinds, screens, curtain rods, drapery rods, fireplace inserts, fireplace screens, fireplace grates, heating stoves, storage sheds, all keys and (c)

none included

(d) Water Rights. Purchase price to include the following water rights: no irrigation water included

none

(e) Growing Crops. With respect to the growing crops Seller and Buyer agree as follows:

Sellers will get any growing crops until date of close.

The above-described included items (Inclusions) are to be conveyed to Buyer by Seller by bill of sale, none deed or other applicable legal instrument(s) at the closing, free and clear of all taxes, liens and encumbrances, except as

provided in Section 12. The following attached fixtures are excluded from this sale:

none

3. PURCHASE PRICE AND TERMS. The purchase price shall be $300,000.00, payable in U.S. dollars by Buyer as follows: (Complete the applicable terms below.)

(a) Earnest Money.

$3,000.00 in the form of personal check as earnest money deposit and part payment of the purchase price, payable to and held by Western Land Previews (see Addendum attached hereto), broker, in its trust account on behalf of both Seller and Buyer. Broker is authorized to deliver the earnest money deposit to the closing agent, if any, at or before closing.

The balance of $297,000.00 (purchase price less earnest money) shall be paid as follows:

(b) Cash at Closing.

$297,000.00, plus closing costs, to be paid by Buyer at closing in funds which comply with all applicable Colorado laws, which include cash, electronic transfer funds, certified check, savings and loan teller's check, and cashier's check (Good Funds). Subject to the provisions of Section 4, if the existing loan balance at the time of closing shall be different from the loan balance in Section 3, the adjustment shall be made in Good Funds at closing or paid as follows: _____

(c) New Loan.

* * *

COUNTERPROPOSAL

April 18, 1997

RE: Proposed contract to buy and sell the following described real estate in the County of Grand Colorado, to wit:

Parcel A and Parcel B Morales Parcels Subdivision located in SW ¼ Sec. 32, Township 2 North, Range 76 West of 6th P.M. Also known as Lots 2, 3 and 4 Brau Tracts Less approx. 2.40 acres known as Morales Buildings where home and all outbuildings are not included in sale. Sellers are selling 27 acres more or less of vacant land. Exact legal description to be attached, when available, as Exhibit B.

known as No. East Garnet Avenue Granby CO. 80446
Street Address City State Zip

dated March 19, 1997, between Mary Morales, Seller, and Greg McIlvain, Buyer.

The undersigned accepts the proposed contract, subject to the following amendments:

Review Period: Purchaser shall have until June 1, 1997 to determine the suitability of the Property for Purchasers intended use. If Purchaser elects to terminate this transaction on or before the end of the review period, Western Land Previews will return the $3,000.00 earnest money deposit to purchaser and all parties will be released from any further obligation under this contract.

Non Refundable payments: On June 1, 1997 if Purchaser has not terminated this Contract, broker will remit $1,000.00 of the deposit to Mary Morales. On July 1, 1997, if Purchaser elects to continue with the Contract, the

balance of $2,000.00 in brokers trust account will be remitted to Mary Morales. Thereafter, unless the Contract is terminated by Purchaser, Purchaser shall continue to remit $2,000.00 to Seller on the first of each month until closing, with the added provision that upon remittance of $2,000.00 on September 1, 1997, Purchaser shall be obligated to continue making $2,000.00 payments to Seller on the 1st day of the following five (5) months whether or not Purchaser elects to terminate the Contract during that time period. All monies paid in prior to closing will be deducted from the sales price of $300,000.00 at closing. Clsoing [sic] shall occur on or before September 30, 1998.

Purchasers will coop with Seller on a 1031 Tax Exchange if requested by Seller. Any expenses on the 1031 will be paid by Seller.

This Contract is subject to Boulder District Court approving this Contract.

All other terms and conditions shall remain the same. This counterproposal shall expire unless accepted in writing, by Buyer and Seller, as evidenced by their signatures below, and the offering party to this document receives notice of such acceptance on or before April 23, 1997. If accepted, the proposed contract, as amended hereby, shall become a contract between Seller and Buyer.

/s/ Mary R. Morales	/s/ Anna M. Lawson
Seller Mary Morales	Seller Anne Lawson, Conservator
Date of Seller's signature April 23, 1997	Date of Seller's signature April 23, 1997

Seller's Address _____

/s/ Greg W. McIlvain
Buyer Greg McIlvain

Date of Buyer's signature
April 18, 1997

Buyer

Date of Buyer's signature
_____, 19__

Buyer's Address 7000 E. Belleview Ave., Suite 350, Greenwood Village, CO. 80111

N.B. When this counterproposal form is used, the proposed contract is **not** to be signed by the party initiating this counterproposal. This counterproposal must be securely attached to the proposed contract.

Exhibit C
(to Contract dated March 19, 1997 – Morales Property)

ADDENDUM

1. *Conditions to Closing.* This contract is expressly conditional upon the Property being annexed into the town of Granby, mobile zoning in the town, water taps available from Granby and being annexed into the Granby Sewer District.

2. *Closing Date.* Closing scheduled for Sept. 19, 1998, however if all conditions are met prior to that date closing will be 60 days after all conditions are met but no later than Sept. 19, 1998.

3. *Survey.* Purchasers shall pay for survey to cut approx. 2.40 acres and buildings out of the 29.40 acres. They are buying 27 acres more or less. Building site will be about where west fence line is west of buildings and follow Garnet Street east to where cabins are located north of Garnet Ave. The line will go north to clear the garage barn at least 30 ft. on the north of garage barn. It will clear the cabins at least 15 feet on the East side and clear the house at least 40 ft. to the west. If it

takes a portion more than 2.40 acres to clear the boundary line the price will be adjusted on any acreage short of 27 acres at the prorated price per acre.

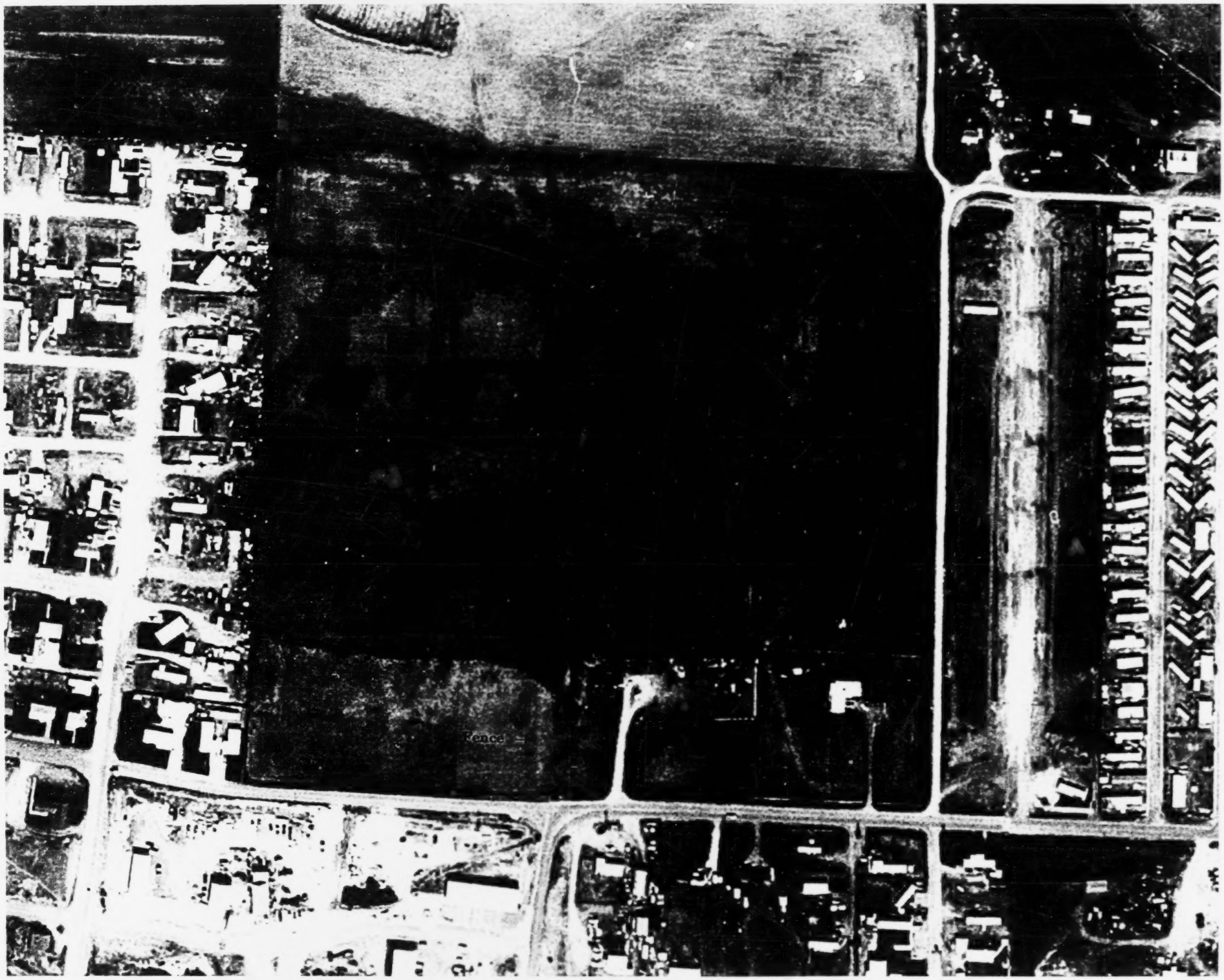
4. *Annexation.* Purchasers shall pay for all surveys, annexation into the Town of Granby and other expenses involved in getting annexed and getting the buildings split from the 27 acres. The seller grants permission for the whole 29.40 acres to be annexed into the Town of Granby.

5. *Review Period.* Purchaser shall have 120 days (the "Review Period") following execution of the Contract to determine the suitability of the Property for Purchaser's intended use, in Purchaser's sole discretion. If Purchaser elects to proceed with the transaction after the Review Period, the $3,000.00 earnest money deposit will be turned over to Sellers by Western Land Previews and will thereafter be non-refundable to Purchaser. However, should Purchaser elect to terminate this transaction on or before the end of the Review Period, Western Land Previews will return the $3,000.00 earnest money deposit to Purchaser and all parties will be released from any further obligation under this Contract.

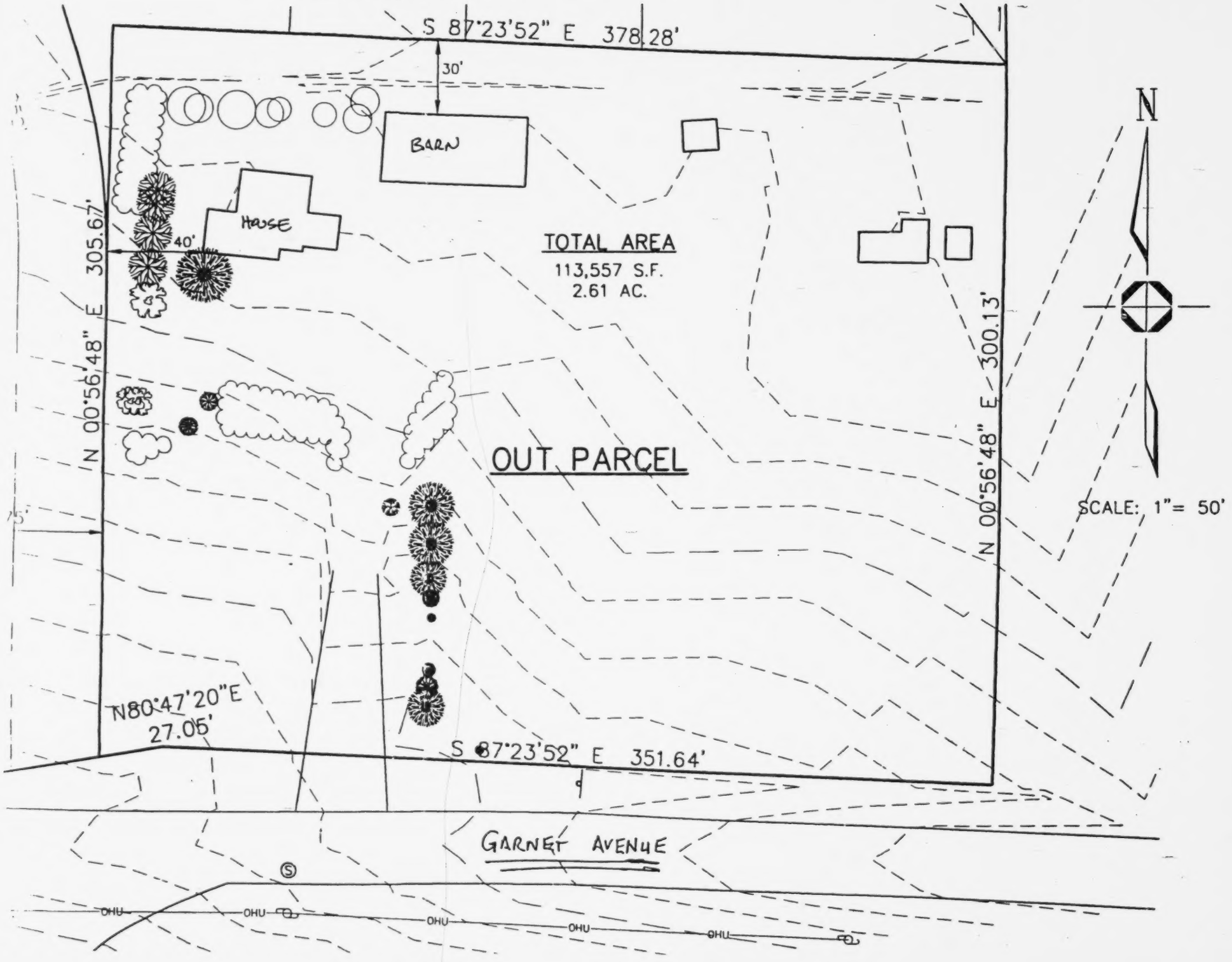
6. *Purchaser's Access.* Purchaser may enter upon the Property prior to closing for the purpose of making soils tests, water availability tests, and other tests deemed advisable by the Purchaser, in Purchaser's sole discretion. Purchaser shall indemnify and hold Seller harmless from any and all claims, liabilities, damages, suits, and cost or expenses incurred therein, including without limitation, reasonable attorney's fees which may result from such inspections or tests.

BEST AVAILABLE COPY

APPENDIX F



APPENDIX G


S 87°23'52" E 378.28'
30'
BARN
HOUSE
40'
N 00°56'48" E 305.67'
TOTAL AREA
113,557 S.F.
2.61 AC.
OUT PARCEL
N 00°56'48" E 300.13'
N
SCALE: 1"= 50'
N80°47'20"E
27.05'
S 87°23'52" E 351.64'
GARNET AVENUE
OHU
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OHU

APPENDIX H

826 P.2d 407

Glenn R. FEIT and Penelope L. Feit,
Petitioners-Appellees,

v.

David J. DONAHUE and Linda L. Donahue,
Defendants-Appellants.

No. 90CA1705.

Colorado Court of Appeals,
Div. I.

Jan. 16, 1992.

No appearance for petitioners-appellees.

Silverman & Riley, Julia D. Riley, Denver, for defendants-appellants.

Opinion by Judge DAVIDSON.

In this action involving the sale of a house, defendants, David J. Donahue (Donahue) and Linda L. Donahue, (sellers) appeal from the judgment entered after a bench trial in favor of plaintiffs, Glenn Richard and Penelope Larae Feit (buyers). We affirm and remand with directions.

In October 1984, the parties contracted for the sale and purchase of a home. The agreement provided, *inter alia,* that the seller was to convey merchantable title and that the property was being sold subject to building and zoning regulations. The following month, sellers conveyed the real estate to plaintiffs by warranty deed and buyers took possession of the property.

For reasons unrelated to this action, three years later buyers decided to sell the house. While they were attempting to list the property, they were notified by the City of Thornton that the certificate of occupancy issued on the house was to be revoked.

The order of revocation explained that, in 1982, sellers had obtained a building permit to convert the existing garage into a family room and to build a new, detached garage. However, the zoning code required that each single-family dwelling have two enclosed off-street parking spaces, and accordingly, the building permit and certificate of occupancy had been issued conditionally upon the construction of a garage. Upon inspection in 1987, the city had ascertained that the garage had not been built.

Upon receiving this notification from the city, buyers contacted sellers and requested either that sellers complete the garage or rescind the agreement. Sellers refused. Buyers were unable to obtain a variance from the zoning board and could not list or sell the house. Ultimately, the home was foreclosed.

Buyers then filed this action against sellers, seeking recovery for damages for breaches of the deed covenants of warranty, quiet enjoyment, and against encumbrances and for fraudulent concealment. At trial, the court dismissed the claims of breach of the covenants of warranty and quiet enjoyment and found against sellers on the claim of breach of the covenant against encumbrances and against Donahue only on the fraud claim.

I.

We first address sellers' contentions of error concerning the breach of warranty against encumbrances. In its ruling, the trial court found that the fact that the city could require a subsequent purchaser to build a garage to bring the property into compliance with the zoning laws constituted a "latent burden" on the property, which "is one for which the sellers are responsible under the [deed]." Sellers argue that such zoning violation does not constitute an encumbrance within the meaning of the covenant in the deed. We agree with the trial court that here the covenant against encumbrances was breached.

A.

Conveyances of real estate are deemed to be in fee simple unless expressly limited, § 38-30-107, C.R.S. (1987 Repl. Vol. 16A), and carry with them the right to immediate possession of the premises. Section 38-30-120, C.R.S. (1982 Repl. Vol. 16A).

A good title in fee simple means the legal estate in fee, free and clear of all claims, liens, and encumbrances whatsoever, "uniting all the elements constituting ownership, including right of possession and right of property." *First Montana Title v. North Point Square Ass'n,* 240 Mont. 33, 782 P.2d 376 (1989). It "imports such ownership of the land as enables the owner to exercise absolute and exclusive control of it against all others." *Walpole v. State Board of Land Commissioners,* 62 Colo. 554, 163 P. 848 (1917).

"[The] grantee under a warranty deed, except for matters specifically enumerated therein, should be in much the same position as [a purchaser of land with the] right to demand title which will put him in all reasonable

security against loss or annoyance by litigation and will enable him not only to hold his land but to hold it in peace." *Fechtner v. Lake County Savings & Loan Ass'n,* 66 Ill.2d 128, 5 Ill.Dec. 252, 361 N.E.2d 575 (1977).

As pertinent here, by the terms of the deed, sellers warranted the property to be free from all "liens, taxes, assessments, encumbrances and restrictions" and warranted "the quiet and peaceable possession of the grantees," and agreed to "warrant and forever defend" against any person lawfully claiming the whole or any part of the premises. *See* § 38-30-113, C.R.S. (1982 Repl. Vol. 16A) (requirements of warranty deed). Nevertheless, sellers first argue that there was no breach of the covenant against encumbrances because there was no "adverse claim of title." In light of statutory requirements for warranty deeds, conveyance of title in fee simple, and right to immediate possession, *see* §§ 38-30-107, 113, 120, C.R.S. (1982 Repl. Vol. 16A), we do not view the scope of the covenant against encumbrances so restrictively.

An encumbrance within the meaning of the covenant is a right or interest in the land which diminishes the value of, but is not inconsistent with the ability to convey, fee title. It includes "any burden resting not only on the title to the real estate, but on the real estate itself which tends to lessen the value or interfere with its free enjoyment." 7 G. Thompson, *Real Property* § 3183 at 272 (1962). Thus, we have held that the existence of a lease constitutes a breach of the covenant against encumbrances. *Downtown Parking Co. v. Vorbeck,* 524 P.2d 629 (Colo.App.1974) (not selected for official publication). *See First American Savings & Loan v. Royall,* 77 N.C.App. 131, 334 S.E.2d 792 (1985) ("An encumbrance [is] any burden or charge upon the land and includes any right

existing in another whereby the use of the land is restricted.").

Accordingly, numerous jurisdictions have held that an existing violation of a zoning law constitutes an encumbrance. *See Wilcox v. Pioneer Homes, Inc.,* 41 N.C.App. 140, 254 S.E.2d 214 (1979) (minimum side lot violation); *Venisek v. Draski,* 35 Wis.2d 38, 150 N.W.2d 347 (1967) (minimum frontage requirement); *Oatis v. Delcuze,* 226 La. 751, 77 So.2d 28 (1954) (non-conforming building); *Lohmeyer v. Bower,* 170 Kan. 442, 227 P.2d 102 (1951) (minimum side lot violation); *Hebb v. Severson,* 32 Wash.2d 159, 201 P.2d 156 (1948) (violation of set-back lines); *Moyer v. De Vincentis Construction Co.,* 107 Pa.Super. 588, 164 A. 111 (1933) (set-back requirement). *But see Barnett v. Decatur,* 261 Ga. 205, 403 S.E.2d 46 (1991) (declines to extend general warranty of title to include zoning matters); *Cameron v. Martin Marietta Corp.,* 729 F.Supp. 1529 (E.D.N.C.1990) (declines to expand the definition of encumbrance to include existing violation of hazardous waste regulations); and *Fähmie v. Wulster,* 81 N.J. 391, 408 A.2d 789 (1979) (stream culvert built in violation of zoning requirements not encumbrance). *See generally, Annot.,* 39 A.L.R.3d 362 (1971).

The applicable Thornton City Code provided, in pertinent part, that in addition to the imposition of fines for violations of zoning requirements, the city could bring an action for injunction, mandamus, or abatement "to prevent, enjoin, abate or remove" any unlawful construction or use. *Thornton City Code, Zoning* § 65-8 (1986). Further, the code empowers the Zoning Board of Appeals to cancel or revoke permits, to require corrective measures, "to direct the city or its agents to enter upon the premises and to take the corrective measures required by

the Board," and to assess such costs against the owner. *Thornton City Code, Zoning,* § 65-9 (1986).

Here, it is undisputed that the house was sold with an existing zoning violation which eventually resulted in the revocation of the certificate allowing occupancy. The city, by ordinance, had the right to enter upon the property and physically conform the property to the zoning requirements without permission of the buyers and at their expense. Moreover, the city by court action could require buyers to build the garage. *See Thornton City Code, Zoning* § 65-8 and § 65-9 (1986). And, the undisputed evidence was that buyers unsuccessfully attempted to obtain a variance and ultimately could not even list the property for sale because it had no certificate of occupancy. Hence, at minimum, as confirmed by subsequent events, the title conveyed to buyers with the existing zoning violation was unmarketable. H. Fusilier, *Real Estate Law,* p. 339 (1977) ("If the real estate is in violation of zoning ordinances, the title is unmarketable.").

Under these circumstances, we hold that the requirement which existed at the time of conveyance that a garage be built to conform to zoning laws constituted an encumbrance. *See First American Federal Savings & Loan v. Royall, supra* ("[W]e have no trouble including the requirement that a water line be constructed before a grantee may occupy property in the definition of an encumbrance").

B.

Citing several cases involving violations of building codes, sellers argue, however, that the logical extension of the trial court's ruling is that "a breach of warranty could

be found in every instance where a property was found not to be in compliance with applicable regulations." For several reasons, we do not agree.

Notwithstanding that the authorities are somewhat divided on the effect of zoning law violations, *compare Wilcox v. Pioneer Homes, Inc., supra, with Fahmie v. Wulster, supra,* they nearly uniformly hold that the sale of a property with structures built in violation of a building code is not a breach of the covenant against encumbrances. *See Gaier v. Berkow,* 90 N.J.Super. 377, 217 A.2d 642 (1966); *McRae v. Giteles,* 253 So.2d 260 (Fla.1971). *But see Brunke v. Pharo,* 3 Wis.2d 628, 89 N.W.2d 221 (Sup.Ct.1958) (official action to compel compliance with building code constituted encumbrance).

"Clearly the rationale is not based so much on legal considerations as on practical ones. With a contrary rule, a buyer could never be sure of his title. Unlike the case of a zoning ordinance, [usually] the violation of a technical building requirement is difficult to discover, especially once the building is constructed." Comment, *Public Land Use Regulations & Marketability of Title,* 1958 Wisc.L.Rev. 128. Accordingly, the sellers' reliance on these cases is misplaced.

Here, the zoning violation required major structural alterations or removal in order to comply with the zoning law. It required either the destruction and rebuilding of part of the existing house or the completion of an entirely new garage on the property.

We contrast this situation to that considered in *FFG, Inc. v. Jones,* 6 Haw.App. 35, 708 P.2d 836 (1985), in which the court concluded that a zoning law violation which merely required the redesigning and repainting of a

parking lot on commercial property did not constitute an encumbrance. "To rule otherwise [would] create instability in real estate transactions since every minor [zoning] code violation would potentially cloud title." *FFG, Inc. v. Jones, supra.*

The zoning violation which existed here at the time of conveyance was hardly minor. *See* 4 *American Law of Property,* 813 (1952) (the existence of improvements requiring alterations or removal in order to correct zoning law violations constitutes an encumbrance). And, because the city issued the building permit and certificate of occupancy only conditionally upon construction of the garage, the possibility of enforcement was not remote at the time of conveyance, and ultimately did occur. "[It] would probably be held in any jurisdiction that an order for alterations of structures already built in violation of law or ordinances, or penalties imposed for such violation, constitute encumbrances." R. Patton, *Patton on Titles* § 606 (1957).

C.

Sellers argue that, nonetheless, there could be no breach of the covenant against encumbrances because the buyers, by the language of the sales contract, agreed to purchase the property "subject to building and zoning regulations." We disagree.

Preliminarily, we do not necessarily agree that a buyer who enters into a realty contract "subject to" zoning regulations is obligated to take the property "subject to" *existing* zoning violations. *See* 6A R. Powell, *Powell on Real Property,* § 900[2][c] at 137 (1991) ("where construction on, or use of, the premises at the time of the conveyance

already violates a restriction, the purchaser may assume that it is permitted and a breach of the covenant will occur"). *See also* Comment, *Effect on Title of Violations of Building Covenants and Zoning Ordinances,* 27 Rocky Mtn.L.Rev. 255 (1955).

Regardless, by the doctrine of merger, the provisions of the contract for the sale of real estate merge at closing into the deed. *Downtown Parking Co. v. Vorbeck, supra.* Thus, here the rights of the parties are determined by the covenants in the deed rather than by the language of the contract. *Skidmore v. First Bank of Minneapolis,* 773 P.2d 587 (Colo.App.1988).

II.

We next address Donahue's argument that the trial court erred in its determination that he fraudulently concealed a material fact in the sale of the property.

A.

Specifically, Donahue contends that his failure to tell buyers about the zoning requirement was a misrepresentation of law, not fact, and thus, the trial court's finding of fraudulent concealment to the contrary was error. We disagree.

To establish a *prima facie* case of fraudulent concealment, plaintiff must prove that the defendant knowingly concealed a material fact that in equity or good conscience should have been disclosed with the intent that the plaintiff act on that concealed fact and that the plaintiff did act on the concealment resulting in damage. *See Berger v.*

Security Pacific Information Systems, Inc., 795 P.2d 1380 (Colo.App.1990).

However, if the representation concerns law, not fact, it is an expression of opinion and is not actionable. *See Chacon v. Scavo,* 145 Colo. 222, 358 P.2d 614 (1960) (a representation of what law will or will not permit to be done is one upon which the party to whom it is made has no right to rely); *Two, Inc. v. Gilmore,* 679 P.2d 116 (Colo.App.1984).

Contrary to Donahue's contention, the trial court did not base its finding of fraudulent concealment on Donahue's failure to disclose the applicable zoning requirement, but on his failure to tell buyers that "a two-car garage was required to be built." With record support, the trial court found that Donahue was aware from his conversations with building officials that in order to convert his original existing garage to residential space he was required to build a detached garage. Thus, to represent to buyer that there was a certificate of occupancy without disclosing that it was conditioned on the construction of a new garage was a concealment of a material fact, not a misrepresentation of law. *See Two, Inc. v. Gilmore, supra.*

B.

We also disagree with defendant's contention that the trial court erred in finding fraudulent concealment because the evidence was insufficient to prove that Donahue knew that the property violated the city's zoning laws.

Whether there has been a misrepresentation is a question of fact to be determined by the trier of fact, *see Morrison v. Goodspeed,* 100 Colo. 470, 68 P.2d 458 (1937),

and if the trial court sits as the trier of fact, its findings will not be disturbed on appeal if supported by competent evidence. *Johnson v. Smith,* 675 P.2d 307 (Colo.1984).

The record reveals evidence that Donahue knew that he was required to build a garage. At trial, he testified that when he applied for a building permit to convert his garage into a family room and to build a detached garage, he was told, "Normally, we'd have you build the garage first [but] we'll work with you." Thereafter, the city issued to Donahue a certificate of occupancy which reiterated: "Convert existing garage to family, add det[ached] garage."

Because it is within the province of the trial court to judge the credibility of witnesses and the sufficiency and weight of the evidence, *People in Interest of M.S.H.,* 656 P.2d 1294 (Colo.1983), and there is ample evidence in the record to support its findings, we conclude that the trial court did not err in determining that Donahue knew about the zoning violation. Certainly, since Donahue knew that the certificate of occupancy was conditioned on adding a detached garage, the trial court was justified in concluding that the concealment of that fact was not innocent. *See People in Interest of A.J.,* 757 P.2d 1165 (Colo.App.1988).

III.

A.

The trial court awarded $6,848 to buyers on their claims for fraud and breach of warranty, employing the "benefit of the bargain" measure of damages. Sellers do not challenge the propriety of the damages award on the breach of warranty, nor does Donahue contend that the measure of damage used by the trial court with respect to the fraud claim was improper; thus, we do not reach these

issues. Donahue does assert, however, that because the buyers bargained for exactly what they received – a house without a garage, an award of damages to buyers for the construction of a garage under the circumstances here constitutes a "windfall." We disagree.

Contrary to Donahue's assertion, buyers did not receive the benefit of their bargain. Instead, they received a house which, because it was in violation of a zoning law at the time of conveyance, was unmarketable, subjected them to the hazard of litigation, and was ultimately unsellable. *See* H. Fusilier, *Real Estate Law, supra.*

Therefore, the trial court correctly determined that a proper award here would be what the property would have been worth had there not existed the detriment to the property of having to build the garage in order to bring the house into compliance.

B.

Finally, sellers contend that the trial court erred in including as damages attorney fees from buyers' prior foreclosure proceedings and from this litigation. We agree.

A party generally cannot recover attorney fees absent a specific contractual, statutory, or procedural rule authorization. *Beebe v. Pierce,* 185 Colo. 34, 521 P.2d 1263 (1974); *Marquez v. County Court,* 719 P.2d 737 (Colo.App.1986). However, when the natural and probable consequence of a wrongful act has been to involve plaintiff in litigation with others, the reasonable expenses of that litigation are recoverable from the wrongdoer. *Elijah v. Fender,* 674 P.2d 946 (Colo.1984); *McNeill v. Allen,* 35 Colo.App. 317, 534 P.2d 813 (1975).

Accordingly, the trial court correctly awarded attorney fees from buyers' variance controversy with the city which was a "natural and probable consequence" of Donahue's concealment. *See McNeill v. Allen, supra.* However, because the trial court found that the foreclosure was caused by buyers' own failure to make mortgage payments and because there is no apparent justification for departing from the general rule with respect to the attorney fees from this trial, *see People v. District Court,* 808 P.2d 831 (Colo.1991); *Beebe v. Pierce, supra* (attorney fees are not recoverable in an action for fraud), we conclude that attorney fees from these actions were erroneously awarded.

The judgment is affirmed except as to the award of attorney fees for the trial of this action and for buyers' foreclosure proceeding, and the cause is remanded for a determination of the buyers' reasonable attorney fees in their controversy with the city.

STERNBERG, C.J. and PIERCE, J., concur.

APPENDIX I

867 P.2d 70

LOOKOUT MOUNTAIN PARADISE HILLS HOMEOWNERS' ASSOCIATION, a Colorado nonprofit corporation, Plaintiff-Appellee,

v.

VIEWPOINT ASSOCIATES, a Colorado general partnership, Defendant-Appellant.

No. 92CA0989.

Colorado Court of appeals,
Div. V.

June 17, 1993.

Rehearing Denied July 15, 1993.

Certiorari Denied Feb. 7, 1994.

DeMuth & Kemp, Lael S. DeMuth, Barbara G. Chamberlain, Denver, for plaintiff-appellee.

Deutsch, Spillane & Reutzel, P.C., John M. Spillane, Englewood, for defendant-appellant.

Opinion by Judge DAVIDSON.

Defendant, Viewpoint Associates, (Viewpoint) appeals from the declaratory judgment in which the trial court found that plaintiffs, Lookout Mountain Paradise Hills Homeowners' Association (Homeowners' Association) had the right of architectural control over lots owned by Viewpoint. We affirm.

The property in question is part of a subdivision platted by Paradise Hills, Inc. (PHI) and on which, in 1958, PHI recorded protective covenants. As relevant here,

that declaration of covenants provides that PHI has the right of architectural control and that PHI could, "by appropriate agreement, assign or convey to any person, persons or corporation" that right or, at its sole discretion, could cause to be formed a non-profit homeowners' corporation to which PHI could assign its right of approval.

Over the next 22 years, PHI conveyed lots to individual grantees until, in 1980, it conveyed to Viewpoint all lots remaining in the Paradise Hills subdivision. Included in this conveyance were the lots that are the subject of this controversy.

In July 1981, approximately one year after PHI had thus sold all of its lots, PHI formed the Homeowners' Association. This was accomplished with the cooperation and participation of Viewpoint, and Viewpoint's developer served as the Association's initial director. According to the articles of incorporation, the purpose of the Homeowners' Association was to "assume the responsibility for the management and enforcement of the protective covenants of the various Paradise Hills Units, including the organization and operation of an Architectural Control Committee for the approval of plans pursuant to the protective covenants for the various Units."

In September 1981, Viewpoint recorded certain additional, more stringent restrictive covenants to which the Viewpoint lots were subject, creating another architectural control committee to which purchasers of these lots were required to submit plans. As found by the trial court, these covenants did not replace the original Paradise Hills covenants, but added a second layer of restrictions on the Viewpoint property, thus subjecting Viewpoint owners to both sets of restrictive covenants.

In November 1981, the Homeowners' Association received from PHI an assignment of PHI's rights and interests as grantor under the original covenants, "including, but not limited to the right to approve building or other improvement plans on any structures" in the subdivision. At issue in this action is the validity and effect of this assignment.

Over the next seven years, only one home was built that was subject to both sets of covenants. The plans for that home were submitted to and approved by Viewpoint only. The Homeowners' Association took no action.

Then, pursuant to a 1988 option to purchase, some of the subject lots were acquired from Viewpoint by a third developer, Genesee Company. During subsequent construction by Genesee of approximately 30 homes, Genesee submitted all construction plans to both the Viewpoint architectural control committee and the Homeowners' Association's architectural control committee. However, submission of plans to Paradise Hills was under express reservation by Genesee concerning its authority to approve or disapprove the plans. In 1990, a dispute arose between Genesee and the Homeowners' Association over certain homes that were not in compliance with previously approved plans.

When Genesee further challenged its right of architectural review, the Homeowners' Association filed this declaratory action to resolve the dispute. It sought, *inter alia,* injunctive relief and a declaratory determination of the legal rights and authorities of the architectural control committee established by the Homeowners' Association as it pertained to properties owned by Genesee. After the option to purchase expired and certain of the subject lots

reverted to Viewpoint, Viewpoint was allowed to intervene as a party defendant.

After a trial to the court, the trial court found that, pursuant to the assignment from PHI, the Homeowners' Association assumed the authority to approve or disapprove plans for the entire Paradise Hills subdivision, including the lots now owned by Viewpoint and Genesee. This appeal, by Viewpoint only, followed.

I.

Viewpoint contends that the Homeowners' Association failed to prove that the authority of PHI to perform architectural review had been assigned to it. Specifically, Viewpoint argues that the written assignment was invalid because it did not, on its face, designate an assignee. We disagree.

To constitute a valid assignment, no particular formality is required. However, the intent to make the assignment must be apparent. *Duncan v. Guillet,* 62 Colo. 220, 161 P. 299 (1916). That intent may be reflected by the written instruments executed by the parties or may be inferred from the acts and conduct of the assignor, and it is a question of fact. *See Metropolitan Life Insurance Co. v. Lanigan,* 74 Colo. 386, 222 P. 402 (1924); *Heritage Bank v. Recreational Retail Builders, Inc.,* 97 Ill.App.3d 748, 53 Ill.Dec. 189, 423 N.E.2d 573 (1981) (may be inferred from surrounding circumstances).

Here, PHI executed a written document, denominated an "assignment," which by its terms assigned PHI's "right to approve building or other improvement plans on any structures located on the above described Paradise Hills

Subdivisions." It was signed by both the vice-president and by the secretary/attorney for PHI.

Although the grantee was not designated on the document, the document was delivered to the Homeowners' Association with an explanatory letter addressed to the Association. That letter, drafted and signed by the secretary/attorney of the assignor PHI, stated in relevant part:

> On behalf of [PHI], I am enclosing an assignment of the rights of [PHI] as the original grantor under the original protective covenants . . . In accordance with the terms of those covenants, and with the organization of the [Paradise Hills Homeowners' Association], the rights and duties of the grantor in the covenants now [rest] with the [Homeowners' Association]. This assignment conveys any rights that [PHI] has in these covenants. Included is the right to approve building or other improvement plans in accordance with the covenants.

This assignment to the Homeowners' Association is consistent with the original declaration of covenants providing that PHI had discretion to form a homeowners' corporation to which PHI could assign its right of architectural control. Moreover, the assignment is consistent with the articles of incorporation of the Homeowners' Association.

In light of these facts and circumstances, the trial court did not err by concluding that there was a valid assignment to the Homeowners' Association of the right of approval. *See Alpine Associates, Inc. v. KP & R, Inc.*, 802 P.2d 1119 (Colo.App.1990).

II.

Viewpoint next contends that, even if the assignment was valid, it had no legal effect because at the time that it was executed, PHI no longer had the right of architectural control. Specifically, Viewpoint argues that the right runs with, or is appurtenant to the land and, thus, passed automatically to Viewpoint through the deed. In the alternative, Viewpoint argues that the right was personal and was extinguished when PHI conveyed away all of its interest in the subdivision. Because we conclude that here the right runs with the land, we do not address the alternate contention. We disagree, however, that the right was conveyed to Viewpoint through the deed.

A.

Unlike personal covenants, which operate like a general contract provision and bind only the actual parties to the covenant, real covenants "run with the land" and burden or benefit successors in interest. *Cloud v. Ass'n of Owners,* 857 P.2d 435 (Colo.App.1992).

In order for a covenant to run with the land, not only must the parties to the covenant intend that it do so, *Brown v. McDavid,* 676 P.2d 714 (Colo.App.1983), but the covenant must "touch and concern" the land. *Bigelow v. Nottingham,* 833 P.2d 764 (Colo.App.1991). That is, it must closely relate to the land, its use, or its enjoyment. *Cloud v. Ass'n of Owners, supra. Cf. Bain v. Doyle,* 849 P.2d 910 (Colo.App.1993) (appurtenances generally refer to intangible rights that necessarily must be conveyed for the beneficial use of the property).

Whether a covenant runs with the land turns on the construction of relevant documents. *See Cloud v. Ass'n of Owners, supra.*

Here, the pertinent covenant states:

> [N]o single-family dwelling or other improvements as herein defined shall be erected, placed, or altered on any premises in said development until the building or other improvement plans [have] been submitted to and approved in writing [by] Grantor.

According to the declaration of covenants, the "covenants herein set forth shall run with the land and bind the present owner, its successors and assigns." Thus, by express language, this covenant was intended to run with the land.

Further, among the covenants' stated purposes are "to protect the owners of building sites against such improper use of surrounding building sites as will depreciate the value of their property; to preserve insofar as practical, the natural beauty of such property; [and to] insure the highest and best development of said property." This particular covenant, imposed for the benefit of the entire subdivision, requires that owners submit for PHI's approval plans for any buildings or other improvements which they want to place on the land.

We have no trouble concluding that this covenant relates to the land, *see Cloud v. Ass'n of Owners, supra,* and thus, touches and concerns the land. *See Norris v. Phillips,* 626 P.2d 717, 719 (1980) (requirement that owners submit building plans for approval is "one method by which guarantees of value and general plan of construction can be accomplished and maintained").

Because the parties intended for the covenant to run with the land and because the covenant touches and concerns the land, we conclude that it is a covenant running with the land. *See Cloud v. Ass'n of Owners, supra. Cf. Julian v. Lawton,* 240 N.C. 436, 82 S.E.2d 210 (1954) (court construed similar covenant as personal because it was designed merely to satisfy grantor's aesthetic sense and not intended to benefit successors or purchasers); *but see Smith v. First Savings of Louisiana, FSA,* 575 So.2d 1033 (Ala.1991) (in action by homeowners to reform plat covenants to permit them to elect members to the architectural control committee, court found that covenant designating grantor as sole member of that committee was a personal covenant).

B.

Viewpoint, focusing only on that portion of the covenant granting approval rights to PHI, further contends that this authority runs with the land and passed to Viewpoint by deed upon conveyance of the real property from PHI. We disagree.

Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein. *Wilson v. Goldman,* 699 P.2d 420 (Colo.App.1985). Here, application of these principles to the declaration of covenants does not support Viewpoint's contention.

First, by separating from the covenant PHI's right of approval and asserting that the actual approval authority passes from PHI to Viewpoint, Viewpoint misinterprets the covenant and misconstrues the purpose and intent of

the parties. *See Cloud v. Ass'n of Owners, supra* (court will not cut and paste a covenant before it).

Under the declaration, PHI's power of approval is an integral part of the whole covenant requiring owners to submit plans for its approval. It is not the right of approval, in isolation, which is intended to run with the land. Rather, it is the *entire* covenant – both the obligation of the grantees to submit plans together with the beneficial right reserved to PHI to review such plans – that passes to successive grantees. *See Cloud v. Ass'n of Owners, supra* (covenant ran with the land because it was coupled with covenant which benefitted the land, although it would have been personal if standing alone).

Moreover, Viewpoint's interpretation leads to an illogical result. The declaration of covenants establishes a single approval authority to which all grantees must submit plans. The purpose is to assure to all owners a conformance to a general plan of construction. *See Rhue v. Cheyenne Homes, Inc.,* 168 Colo. 6, 449 P.2d 361 (1969). It defies reason that some portion of that authority was parceled off by deed each time grantor conveyed property to a grantee. *See Pulver v. Mascolo,* 155 Conn. 644, 237 A.2d 97 (1967) (right of approval was intended to be exercised by grantor, not by individual grantees); *Patrone v. Falcone,* 345 Mass. 659, 189 N.E.2d 228 (1963) (unlikely that the common grantor could have intended to give this power of approval to each of the grantees).

Further, if restrictive covenants specifically set forth the manner or procedure for effective transfer of authority to approve or disapprove plans, then such procedure must be complied with for the transfer to be effectuated. *See Howells v. Johnson,* 676 P.2d 1240 (Colo.App.1983).

Here, the declaration provides that the right of approval may be transferred, if at all, at PHI's option; that the transfer must be by "appropriate agreement"; that PHI may transfer any one or more of its beneficial interests; and that such transfer may be to any person, persons, or corporation, or to a homeowners' association created for that purpose.

In our view, this deed by which Viewpoint claims that the right of approval automatically passed demonstrates no agreement, "appropriate" or otherwise, concerning a transfer of PHI's right of approval to Viewpoint. On the other hand, by express language in the deed, Viewpoint acquired title to the land "[s]ubject to easements, restrictions, right of ways and reservations of record, including those contained in [the] protective covenants." One such reservation would be PHI's right to approve plans. *See* H. Fusilier, *Real Estate Law* § 5.7 (1977) ("subject to" language in deed indicates exceptions to general rule that property is conveyed free and clear of all encumbrances and restrictions); *Barker v. Jeremiasen,* 676 P.2d 1259 (Colo.App.1984) (purchasers received deed "subject to" protective covenants and were thus bound by them).

In view of the specificity with which the transfer of this right is addressed in the covenants, we agree with the trial court that this deed was not intended by PHI to work as a transfer of that right. *See Howells v. Johnson, supra.*

Viewpoint asserts, nonetheless, that the parties contemplated transfer of that right as evidenced by the provision in the contract for sale which states that "seller agrees upon request of purchaser to assign to purchaser all of seller's rights as declarant under the restrictive covenants." However, since Viewpoint's developer and its

attorney testified that they did not ask PHI to assign those rights, the existence of this contract provision is irrelevant. Moreover, at closing all provisions of the contract merged into the deed. Thus, the rights of the parties are determined by the deed, not the contract. *See Feit v. Donahue,* 826 P.2d 407 (Colo.App.1992).

Supported as the trial court's ruling is by the evidence, we conclude that the trial court properly found that PHI did not convey its right of architectural control to Viewpoint by this deed.

III.

Viewpoint finally contends that even if the assignment of the right of architectural control was effective, the Homeowners' Association, by its long acquiescence in not asserting its right of architectural control, is precluded from asserting that right under the equitable doctrines of waiver or estoppel by reason of delay or laches. We disagree.

The doctrine of estoppel by reason of delay or laches involves full knowledge of the facts, unreasonable delay in assertion of available remedy, and intervening reliance by and prejudice to another. *Manor Vail Condominium Ass'n v. Town of Vail,* 199 Colo. 62, 604 P.2d 1168 (1980).

Waiver is the intentional relinquishment of a known right. If relinquishment is implied by conduct, that conduct must clearly manifest the intention not to assert the benefit. *Department of Health v. Donahue,* 690 P.2d 243 (Colo.1984).

Whether these equitable defenses have been established is a question of fact. *P-W Investments, Inc. v. City of*

Westminster, 655 P.2d 1365 (Colo.1982); *Nikolai v. Farmers Alliance Mutual Insurance Co.,* 830 P.2d 1070 (Colo.App. 1991).

Here, the trial court found that only one home was constructed between 1981 and 1988 on the Viewpoint property and that the Association took no action to enforce its right of approval even though the owner of that home failed to submit its plans to the Homeowners' Association. It further found that in 1988, when subsequent construction began, the Homeowners' Association required all plans to be submitted to it for approval. In light of these findings, the trial court, specifically noting that for seven years no construction took place in the subdivision, concluded that the circumstances did not support equitable relief.

Implicit in the court's determination is a finding that the Homeowners' Association's inaction with regard to the one Viewpoint home built in 1981 was not an intentional relinquishment of its right of control and that its delay was not unreasonable. As these findings are supported by the record, we will not disturb the trial court's determination on appeal.

Insofar as Viewpoint argues that this action is barred by the statute of limitation, we observe that this was not pleaded in its answer and, thus, will not be addressed for the first time on appeal. *See Christensen v. Hoover,* 643 P.2d 525 (Colo.1982).

The judgment is affirmed.

HUME and TAUBMAN, JJ., concur.